sanction of this court that it would not have been deemed necessary again to reaffirm them, had not the extent of the doctrine been questioned at the bar." (At p. 634).

The second important distinction from *Ballentyne* lies in the nature of the *res*. A tugboat is different both in valuation and in character from the real estate, right-of-way, and equipment in *Ballentyne*. As stated by the court below:

> "Vessels have value only when in use and when lying idle at the docks not only do they produce no income, but the dockage fees and expenses for maintenance and protection continue to mount. Accordingly, it is desirable that a judicial sale of the vessel should stand confirmed and the vessel delivered to the purchaser as promptly as possible." *Golden v. Oil Screw FRANA T. SHERMAN*, 455 F.2d 133, 135 (CA 1 1972).

As is obvious, a vessel lying idle will deteriorate and lessen in value as well as run up expenses. On the other hand, it would be expected that real property and a right-of-way would probably increase in value through the passage of time. Presumably, this is the reason for a provision in the Supplemental Rules for Admiralty and Maritime Claims for interlocutory sales [Rule E(9)(b)]. Because of the nature of the *res*, it is not feasible to have an extended time for upset bids when vessels are sold.

The character of the *res* is also different in that there is no problem of continuing jurisdiction over a railroad and its real estate as there is with a vessel. Once the petitioners allowed the Marshal's Bill of Sale to be issued without asking for a stay and filing a supersedeas bond, they effectively destroyed the

jurisdiction over the *res* no matter what the courts should decide to do with the results of the sale. After delivery of the Bill of Sale, the vessel was free to go anywhere in the world, to be sold, mortgaged or chartered, to be abandoned or sunk, to be altered or rebuilt or to be renamed. This question of jurisdiction arose in a similar case considered by the Fourth Circuit and the Eastern District of Virginia in *Lambert's Point Towboat Company* v. *United States*, 182 F. 388 (CA4 - 1910) and its progeny, *The John Twohy, Jr.*, 189 F. 965 (E.D. Va. - 1911). The Court of Appeals found that a judicial sale of a tugboat had in no way conformed to the rules and statutes concerning public auctions, was highly irregular, and therefore reversed the sale. The matter was remanded to the District Court with directions to proceed as may be proper considering the interests of all the parties. On remand, the District Court found that although the sale may be set aside, the passage of title of the tug was final and irrevocable because appellants had failed to apply for a supersedeas in order to prevent passage of title. The Court then went on to consider the question that even if it should revoke the title which had passed, it no longer had jurisdiction over the tugboat. The Court envisioned the litigation necessary to retrieve the tugboat and decided that it could not and if it could, would not attempt such a course of action. We are faced here with the same problem wherein the petitioners would put the courts in the position of having to enter into litigation to reassert control over the tugboat in question, without any guarantee of success.

It is clear that because of special considerations which must be given to the differences between the *res* and because of the completely different factual situations, there is no conflict between *Ballentyne* and the present case. In fact, there is a striking similarity between the action of the Supreme Court of Hawaii and then the Supreme Court of the United States in

Ballentyne and the action of the Fourth Circuit in our case in recognizing and accepting that the tribunal immediately involved with the sale had exercised its discretion - by refusing to confirm in *Ballentyne* and by confirming in the instant case. Noting this exercise of discretion and the familiarity of the initial tribunals with the factual situations and the parties involved, the appellate courts in both cases refused to reverse, finding no abuse of discretion.

Gelfert v. National City Bank of New York, 313 U.S. 221 (1941), cited by petitioners as being contrary to the decision of the Fourth Circuit in the present case is clearly inapposite. Besides the aforementioned differences concerning real estate versus vessels, the rationale of the decision had nothing to do with reversing the judicial sale in question. At stake was a New York State statute whose effect was to prevent a mortgagee from obtaining more than one hundred per cent payment on a debt via a foreed sale plus a deficiency judgment. This statute provided that if the State Court should find that the judicial sale price was below the reasonable market value, the Court could use the higher reasonable market value to determine the amount of the deficiency judgment rather than just subtracting the sale price from the amount due. There is no intimation in the Supreme Court decision that the judicial sale should be overturned, but only that the statute requiring a deficiency judgment to be based upon the higher of the market price or sale price was constitutional and should be followed. Since we are dealing here only with the results of an interlocutory sale, the *Gelfert* case is neither on point nor in conflict.

Since one of the bases for rejecting petitioners' motion to overturn the sale was the two-day time limit for exceptions found in local Admiralty Rule 3(b), petitioners cited *Gardner v. Panama R.R.*, 342 U.S. 29 (1951) as being in conflict. There is

an error in petitioners' brief which changes the meaning of the *Gardner* case substantially. In the quote found on page 9 of said brief it should properly read:

> ". . . Where there has been *no* inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief (cites omitted) (Emphasis added).

It would appear that this Honorable Court has set up two criteria to be considered in reviewing the application by lower courts of the doctrine of laches. We do not feel that laches applies in the situation of a local Admiralty Rule insofar as it requires a showing of prejudice to the respondent in this case. We feel that Rule 6(b) of the Federal Rules of Civil Procedure would apply which requires the moving party to show cause for an extension and which further requires a showing that the failure to act was the result of excusable neglect. Both these points were considered below and it was found by the District Judge and affirmed by the Court of Appeals that there was not good cause shown and furthermore that failure to attend the sale and failure to file exceptions in time was not excusable neglect. For the first time, petitioners have brought up the question of laches and state that there was no showing by the defendant below that the delay prejudiced them in the least. The Court below understood and found that there must be prejudice when a vessel is made to lie idle longer than the statutory requirement, *Golden* supra p. 135. Even should this Court decide that the doctrine of laches should apply, we feel that the Courts below in their weighing of the evidence and within their discretion have decided that the delay was not excusable and moreover that any delay would have to be prejudicial to the purchaser of a vessel at a judicial sale. In the *Gardner* case the plaintiff had been in Court twice within the

prescribed statute of limitations but had been thwarted twice by the Federal Statute and an intervening Act of Congress. There was no doubt that the petitioner in that case had made substantial efforts to bring her action in a timely manner which is not the case here.

II. THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER DECISIONS OF THE FOURTH CIRCUIT OR WITH DECISIONS OF OTHER CIRCUIT COURTS CONCERNING INADEQUACY OF PRICES AT JUDICIAL SALES OR THE APPLICATION OF RULES LIMITING THE TIME TO FILE EXCEPTIONS.

Petitioners cite *The Appam*, 240 F. 276 (CA4 - 1917) as being in conflict with the decision below. Not only is there no conflict between *The Appam* and the present case, but *The Appam* may be cited as in support of the position of the respondent in two respects. In the District Court after the original purchaser at a judicial sale failed to pay the purchase price, a second sale was ordered. Apparently when timely objections were filed by the master of the Appam, the second sale was set aside by the District Court and a third sale held. The only question decided by the Fourth Circuit on appeal was the disposition of the difference in purchase price between the second and third sales. The appellant was the purchaser at the second sale and wanted the $963.20 difference which was being held by the Court. There was never in the appeal to the Fourth Circuit any question of overturning the third sale and requiring a resale of the commodity in question, cocoa beans. This reinforces the point that there should be no resale of the tugboat but that petitioners should look instead to their various other remedies - the proceeds of sale and the pursuit of deficiency judgments against the remaining *in personam*

defendants. The language of the *Appam* Court, as quoted in petitioners' brief, further distinguishes that case from ours by indicating the difference between commodities with ascertainable values versus property such as land or vessels:

> "When the property sold is land, or vessels, or other things having no definite or quotable market value, and evidence of inadequacy consists of opinions of witnesses, or even of an offer to pay a greater price, made upon information derived from the sale, or after the sale, great caution should be exercised in denying to the purchaser the benefit of a bargain which he took the risk of making. On the other hand, commodities sold and quoted daily on the market have a value which can be definitely ascertained, and as to them inadequacy of price so gross as to shock the conscience is a much more definite conception." (At p. 678).

American Tramp Ship. and Dev. Corp. v. *Coal Export Corp.*, 276 F.2d 570 (CA4 - 1960) cannot be construed as being in conflict with our case for three obvious reasons. First, a timely exception to the sale price was made. Secondly, an upset bid $40,000 higher than the original sale price was filed within the time required by the Court, and thirdly, the Fourth Circuit upheld the District Court's decision which constituted an exercise of discretion without any evidence of abuse of same, exactly as they did in the instant case. Likewise, *Ghezzi* v. *Foss Launch & Tug Co.*, 321 F.2d 421 (CA9 - 1963) is easily distinguishable from the present case on several important points. First, there was no assessed value of the Tug Frank T. Shearman in this case nor was there ever any upset bid filed by petitioners. Most important, the petitioner in *Ghezzi* filed a supersedeas bond and had the District Court stay the delivery of the Marshal's Bill of Sale. By taking these actions, petitioner properly prevented the transfer of title pending the outcome of

litigation, the steps which should have been taken in this case but were not.

Petitioners attempt to find a conflict between circuit courts by comparing the decision in the present case with that of *Schiavone - Bonomo Corp.* v. *Buffalo Barge Towing Corp.*, 134 F.2d 1022 (CA2 - 1943), cert denied, 320 U.S. 749 (1943). As petitioner states, the Court in the *Schiavone* case apparently followed the policy found in Rule 6(b)(2) of the Federal Rules of Civil Procedure, 28 U.S.C.A., supra. There is not however, any evidence in the record that the same policy was not followed in this case. Judge MacKenzie's words, as quoted in Mr. Justice Craven's dissent were to the effect that:

> "Local Admiralty Rules indicate that an upset bid must be put in within forty-eight hours after the sale took place. The sale took place on June 8, and the question of setting it aside is more than forty-eight hours past. So on that basis I would not entertain *your* motion to set it aside." *Golden* supra (At. p. 136) (Emphasis added).

Prior to that Judge MacKenzie had discussed the petitioners' failure to appear at the sale to protect their interests and no excuse had been offered by petitioners for that failure or for the failure to file exceptions within the forty-eight hour statutory period. In order to justify an extension of time under local Rule 5(b) the burden is upon the petitioners to show cause why an extension should be made and also to show that the failure to act was the result of excusable neglect. We reiterate that in Judge MacKenzie's discretion, affirmed by the Court of Appeals, there was not good cause shown and there was no excuse for the failure to act. There is no statement by Judge MacKenzie that the two-day time limit could never be extended for cause such as foreign parties having no notice or unsuccess-

ful attempts to bid or file exceptions. This was clearly an act of discretion by the District Court and there is no evidence of any abuse of this discretion.

III. THE DECISION BELOW IN NO WAY CONTRAVENES THE POLICY PROTECTING THE WAGES OF SEAMEN.

Your respondent has no dispute with the cases offered by petitioners in Section 3 of his arguments for granting a writ. It is well understood that:

> ". . . as long as a plank of the ship remains, the sailor is entitled against all other persons to the proceeds as a security for his wages." *The John G. Stevens*, 170 U.S. 113, 119 (1898).

As a matter of fact, the proceeds of the judicial sale of the Frank T. Shearman are still being held by the Court pending an order distributing same. Moreover, there is no question but that the wage claims come ahead of the preferred mortgage holder in the distribution of said proceeds. Once a judicial sale has taken place, however, and title has passed to the buyer, there is no plank of the ship remaining, and the wage claimant must look to the proceeds of the sale or to the appropriate *in personam* remedy.

CONCLUSION

It is respectfully submitted that there was no error on the part of the District Court Judge in refusing to set aside the sale of the Shearman, nor was there any error on the part of the

Fourth Circuit Court of Appeals in affirming the District Court's decision. Moreover, petitioner has failed to show that the decision of the Court of Appeals in this case is in conflict with any decision of this Honorable Court, of any Circuit Court or any applicable Court or Congressional policies. The petition for the writ of certiorari should be denied.

Respectfully submitted,

G. W. Birkhead, *of Counsel*
Vandeventer, Black, Meredith
& Martin
Counsel for Respondent